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IN THE

Supreme Court of the United States

October Term, 1962

JOHN MOODY, SR. and WILLIAM MURPHY,
Petitioners,

—v.—

THE WATERFRONT COMMISSION OF NEW YORK HARBOR,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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INDEX

PAGE

I. "Waiver" and "estoppel" as supposedly rendering this case unsuitable for certiorari on the issues as to failure to protect petitioners against federal incrimination 1

II. The issues as to Knapp v. Schweitzer, 357 U. S. 371 11

III. The issue of the reasonableness of petitioners' fear of federal incrimination 13

IV. The issue of equal protection 14

V. Other misstatements in respondents' brief in opposition 15

CONCLUSION 16

AUTHORITIES CITED

Cases

Brown v. United States, 356 U. S. 148 7

Feldman v. United States, 322 U. S. 487 ..... 12, 13

Hernandez v. Texas, 347 U. S. 475 14

Knapp v. Schweitzer, 357 U. S. 371 ..... 11, 13

Malloy v. Hogan, No. 1031 (June 3, 1963) 11

Pembina Consolidated Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181 14

Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362 14

United States v. Miranti, 253 F. 2d 135 (C. A. 2 1958) 9

Statutes

Fifth Amendment 11

Fourteenth Amendment 14

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

I. "Waiver" and "estoppel" as supposedly rendering this case unsuitable for certiorari on the issues as to failure to protect petitioners against federal incrimination.

The respondent Waterfront Commission argues (Br. in Opp. pp. 8 *et seq.*) that "this is a singularly inappropriate case in which to consider a claim of federal incrimination upon a grant of state immunity because here that issue is seriously complicated by questions of waiver, estoppel and reasonableness".

(The issue of "reasonableness", i.e., whether petitioners had reason to fear federal incrimination, is treated under a separate heading *infra.*)

The Court below rejected the respondent Commission's contentions that the petitioners had waived the privilege against self-incrimination or were estopped in that regard (Pet. 13a). The respondent Commission in its brief in opposition herein (pp. 9, 11) tries to minimize the significance of this ruling by the Supreme Court of New Jersey. The actual language of the Court below on this point was (Pet. 13a):

> "* * * The Commission recognized the defendants' right to assert the privilege at its hearing of October 3, 1961, and the trial court on October 4, 1961 also recognized their right when it purged them of their original contempt. Moreover, at its hearing on October 27, 1961, the Commission clearly recognized the defendants' right to assert the privilege when it granted them immunity against prosecution. Finally, the contentions of waiver and estoppel were never raised by the Commission in the court below and therefore it may not raise them for the first time in this court."

The above rejection, by the Court below, of the Commission's arguments as to waiver and estoppel occurred in the face of the intensest sort of effort by the Commission in that Court to prevail on those issues. At p. 55 of the Commission's brief in the Court below the Commission went so far as to make the following serious accusation against the within petitioners Murphy and Moody:

> "* * * clearly, defendants do not feel bound by any statement they may have made in any other Court or at any other stage of the Commission's contempt proceedings."

Before this Court the Commission levels a similar accusation, stating (Br. in Opp. p. 8):

> "As noted, in their original appearances before the Commission in this investigation, petitioners specifically stated that they were not claiming the privilege against self-incrimination. Rather, they contended in the first contempt proceedings against them not only that their conduct was innocent and lawful but that their conduct was actually protected by federal labor legislation. Then, after the court below (the Supreme Court of New Jersey) affirmed the original civil contempt judgments and this Court denied review, petitioners, in a cynical *volte face*, proceeded to claim the privilege against the self-incrimination."

Because these accusations directly affect the merits of our certiorari petition, we are obliged to reply to them. We shall therefore now show that while the respondent Commission thus accuses the petitioners Murphy and Moody in effect of resorting to an unscrupulously opportunistic litigation strategy, it is actually the Commission itself that is guilty of exactly that sort of strategy in its contentions of "waiver" and "estoppel".

Whereas the Commission accuses Murphy and Moody of supposedly improper alleged changes of position in their refusal to testify (*i.e.* that they improperly changed from the ground of N.L.R.B. preemption or lack-of-jurisdiction in the prior contempt case to the self-incrimination ground in the second contempt case), what the Commission itself has done is that it has switched from (1) the ground that it possessed jurisdiction because the work stoppage was not a labor dispute but a *criminal* enterprise within the Commission's jurisdiction over waterfront crime, to

(2) the ground that Murphy and Moody are now insincere in claiming that they believe the Commission meant what it said when it spoke of waterfront crime as being the essence of the prior stage of this case.

In other words, when the Commission wanted to win in the courts the first round of this controversy arising from the original May 1960 interrogation of Murphy and Moody, the Commission was all hot and earnest over how crucial a "crime" case this is—because "crime" emphasis was necessary to win in the courts against Murphy's and Moody's N.L.R.B. jurisdiction argument. But now, in the instant second round of the controversy, arising from the purported immunity-conferrals of October 1961, where in order to win it becomes necessary for the Commission to pooh-pooh the "crime" phase so as to discredit Murphy's and Moody's fear of federal incrimination, the Commission strives to convince the courts that Murphy and Moody are engaging in "a cynical *volte face*" when they accept the Commission's own former trumpetings of the waterfront crime issue.

At the very first hearing before the Commission, in May, 1960, before any contempt proceedings had been brought, the Commission spoke exclusively of a "work stoppage", expressly stated that it did not know whether there was "anything wrong", and expressed its ignorance as to whether any "crime" element was involved. *E.g.*, DD34a-35a.*

* "DD a" refers to the printed "Appendix to Brief for Appellants" in the Superior Court of New Jersey, Appellate Division, which served also as such "Appendix" in the Supreme Court of New Jersey in the appeal from the first contempt judgment—which culminated in the dismissal by this Court of the prior appeal to this Court (368 U. S. 32). Nine extra copies of the latter Appendix were filed with our Jurisdictional Statement in this Court in the aforesaid prior appeal.

Is it surprising that, in those circumstances, the witnesses Murphy and Moody put their entire thrust on the N.L.R.B. jurisdiction issue and refrained from incurring the odium of pleading the privilege against self incrimination? Then, within literally hours after those initial events in May, 1960, the Commission was in court with elaborately prepared papers to hold the witnesses for contempt on the ground that the Commission's *crime-preventive* powers were at stake (DD1a to 12a). And then, throughout the ensuing stages of the prior contempt litigation, the Commission played this "crime" theme to the hilt. See the Commission's printed Brief and Appendix in the Court below in the prior appeal (Docket No. A-790-59), pp. 2-14, especially pp. 13-14. See, also, the Commission's "Motion To Dismiss Appeal" in this Court, October Term 1961, No. 362, pp. 4, 8-9. See, also, the opinions of Judge JOSEPH L. SMITH and of the Supreme Court of New Jersey in the prior proceeding, printed in full in the Appendix to our Jurisdictional Statement in this Court in the prior proceeding (the former opinion of the Court below is reported at 35 N. J. 62); both of those opinions are replete with the "crime" theme that the Commission had so strenuously urged upon those Courts.

Let us examine a little further into the consequences of these gyrations by the Commission. Suppose it is true that the Commission now sincerely believes that Murphy and Moody "waived" the privilege or are "estopped" from asserting it as of the time of the hearings in October, 1961. Why, then, did not the Commission then and there (in October 1961) move for contempt on such grounds of waiver and estoppel; why did the Commission instead "process" Murphy and Moody for enmeshment in the

"immunity" net; and why did the Commission defer its second contempt effort until it had first closed this net around the victims? If the Commission had taken the proper course (proper, that is, as judged by the Commission's own present claimed sincere professions to this Court on the issues of waiver and estoppel), *i.e.*, the course of moving for contempt in October 1961 on the grounds of waiver and estoppel alone and without the imported addition of "immunity", the defendants would at least have had explicit apprisal *for trial purposes* that they were thus facing contentions of waiver and estoppel.

This opportunism in the Commission's tactics serves to accentuate more starkly perhaps than anything else in the case an important area of due process aggrievement which we assert in this case, namely, the utter inadequacy of the so-called "trial" for contempt. For what we now see is not only that that "trial" was constitutionally nugatory for all of the reasons asserted in our Petition, but that it was additionally defective because it did not even pass at all ("trial"-wise or otherwise) upon the issues of waiver and estoppel which the Commission now tenders to this Court as the very head and front of the Commission's stand in this certiorari proceeding.

Of course, the real factors which have impelled the Commission to go through all of these twistings and turnings include not only the factor of the Commission's sheer desire to win at any price, but they include also the stubborn truth that the Trial Court itself, on October 4, 1961, formally adjudged that Murphy and Moody were entitled to plead the privilege against self incrimination and that their having so pleaded had the effect of purging them of the original contempt (D54a).

Were the situation not so aggrieving, it would be simply preposterous. A supposedly responsible Governmental body, enjoying extraordinary powers as the official trustee of two state sovereignties with the formal blessing of the Congress of the entire country, accuses citizens of repudiating an alleged "waiver" and "estoppel" when this same body itself expressly and repeatedly waived those supposed "waivers" and estopped itself from invoking those supposed estoppels.

Apart from the general considerations above suggested, the Commission's stand on the supposed issues of waiver and estoppel is legally unsound on the record facts of this case in any event.

This Court has declared that a witness compelled to testify has no occasion to invoke the privilege until testimony sought to be elicited will in fact tend to incriminate him. *Brown* v. *United States,* 356 U. S. 148. As seen, there was no occasion for Murphy and Moody to plead self incrimination in May, 1960. But at the second interrogation (October, 1961), the Commission's "crime" theme had come to occupy the forefront of the entire picture.

We have above referred to the fact that after the petitioners invoked the privilege on October 3, 1961 before the Commission, the Trial Judge adjudged that the defendants had purged themselves of the prior contempt judgment. The Trial Judge was at pains to make it explicit and emphatic that this adjudication of purgation marked an absolute closing off of the entire prior contempt proceeding, and that the Commission's announcement (on October 4, 1961) that it contemplated "immunity" proceedings would

give rise to an entirely separate and distinct proceeding (D54a):

> "The Court: The Court has heard the argument on the question now presented to the Court as to whether or not these defendants have purged themselves of the contempt on which they have previously been found guilty.
>
> This Court is satisfied that they have purged themselves of that contempt. They have obeyed the subpoena, appeared for examination, they have been examined by the Commission, and the record of the transcript of the testimony, as read to this Court, which is a part of this record, indicates that their refusal to answer was recognized as a proper ground and legal basis for their so refusing to answer those particular questions, as the record then stood, namely, on the basis of their constitutional right that it might tend to incriminate them. The Examiner so states many, many times in the record that has been presented to me. The fine has been paid."
>
> • • • • •
>
> "• • • What is done then under this statute of immunity is *entirely separate and apart from what* this Court and the appellate courts have already passed upon. It is not a part of this proceeding • • •." [Italics added]

The separateness of the proceeding out of which the present contempt case arises—the immunity proceeding which came later in the month of October, 1961—is further conclusively shown by the fact that the prior contempt case was purely civil, whereas the instant contempt case was both civil and criminal, and was of course, again, based upon a new and separate interrogation of the defendants, an interrogation which moreover imported the wholly new

and additional element of an immunity-conferral. (These last mentioned facts did not prevent the Commission's attorney from trying to make the Trial Court believe that there was no essential legal difference between the two respective contempt proceedings—D180a-D181a.)

It is elementary that, where such separate proceedings are involved, a witness in the subsequent proceeding may not be held to have waived his privilege by any of his testimony in the prior proceedings. *United States* v. *Miranti*, 253 F. 2d 135, 139 (C A. 2 1958), collecting the numerous authorities for this proposition.

It is submitted that the Commission's belated reliance on "waiver" and "estoppel" is not only unsound in law but reveals the fatal weakness of the Commission's entire case before this Court—*i.e.*, if the Commission felt itself secure on the true primary issues herein—*viz.*, the issues of adequate trial and ineffectual "immunity" for failure to cover federal incrimination—the Commission would not tender as its prime issues such frivolous contentions as those of waiver and estoppel on the present record.

Indeed, if the Commission deems the petitioners' use of the privilege nugatory because "waived" and "estopped", the very conferral of immunity to overbear the privilege loses all foundation in the record, and there was no jurisdiction in the Trial Court to entertain the instant contempt motions at all.

Mention should be made also of the respondent Commission's argument at pp. 10-11 of its brief in opposition to the effect that petitioners are "estopped" (as distinct from the "waiver" issue itself) by statements made in one of petitioners' State Court briefs and in our Jurisdictional Statement in this court in the prior contempt case.

First, as to the statement in the State Court brief just mentioned, aside from the fact that the Commission gives the impression that said brief was filed in the instant second contempt proceeding whereas in fact that brief was filed in the first contempt proceeding, the statement from that brief to which the Commission points (Br. in Opp. p. 10) deals only with the question of violence immediately attendant upon the work stoppage itself, not with any question of crime in the *purpose* of the work stoppage, i.e., not with any question of a criminal purpose to get rid of a port security officer so that thefts could be perpetrated. *Second*, as regards the passage in our prior Jurisdictional Statement to which the Commission points (Br. in Opp. p. 11), all we were there saying was that (as we believe has been amply demonstrated to be true) the record in the original interrogation of Murphy and Moody did not establish that the Commission's claim of jurisdiction rested upon "crime" elements in the situation as distinct from sheer "labor dispute" elements.

And, once again, the Commission's over-and-over repeated idea in its Brief in Opposition (see especially pp. 8-11) that petitioners' emphasis upon the N.L.R.B. preemption issue rather than on self-incrimination in the first interrogation and in the first contempt proceeding precluded petitioners from invoking the privilege against self-incrimination at the subsequent interrogations and in the instant second contempt proceeding, completely loses sight of the fact that two separate and distinct proceedings, substantially separated from each other in time, are here involved.

(In conclusion on this point as to "waiver" and "estoppel" we note another instance in the Brief in Opposition

where the Commission has tried to telescope the two separate contempt proceedings by a smoothly inexact presentation of the record facts. (See Br. in Opp. p. 4 where the Commission, in supposedly describing what happened following the remand after the first contempt proceeding, omits to mention that the petitioners were subjected to a wholly renewed interrogation.)

II. The issues as to *Knapp* v. *Schweitzer*, 357 U. S. 371.

At the time of the filing of our petition for *certiorari* and of our supplement to said petition, this Court had not yet granted *certiorari* in *Malloy* v. *Hogan*, No. 1031 (June 3, 1963). Respondents' brief in opposition does not mention this development. We respectfully note that the issue which this Court will be called upon to consider in the *Malloy* certiorari—*viz.*, whether the Fifth Amendment privilege against self-incrimination is applicable in State proceedings *via* the Fourteenth Amendment—bears an integral relation to the issue presented by the instant petition as to the effectiveness of a State grant of immunity which does not extend to federal incrimination.

Respondents' Brief in Opposition misstates our position on the last-mentioned issue in two important respects: (1) At p. 6 of their Brief respondents incorrectly state that "petitioners assert throughout the petition that there was cooperation between the Commission and Federal agencies in the instant investigation", for which respondents cite pp. 4-5 and 21-22 of our Petition. We made no such assertions in our Petition. Rather, we urged that the situation in its nature—the presence of the element of inter-state and foreign waterfront crime, and the quasi-federal character

of the respondent Commission—raised an intrinsic and probable factor of federal-state cooperation for the federal incrimination of persons in the position in which the Commission is pleased to place the petitioners; and, above all, we contended that we were entitled to discovery for the purpose of eliciting the facts as to such federal-state cooperation. (2) Respondents incorrectly state (Br. in Opp. p. 7) that "another basis for petitioners' claim that it was constitutionally required to grant them immunity from federal prosecution is the contention in effect that the Commission, for present purposes, is a Federal agency, because it was created by an inter-state compact approved by Congress", for which respondents cite p. 22 of our petition; and then respondents proceed, with a considerable show of truistic scholarship, to disprove this supposed contention of ours. We made no such contention, and we are obliged to repudiate respondents' efforts thus once again to depict our position in frivolous terms. What we actually said about the Commission's "federal character" appears at p. 22 of our petition.

Respondents also argue (Br. in Opp. p. 6) that the overruling of *Feldman* v. *United States*, 322 U. S. 487 (permitting use in a federal criminal trial of evidence obtained pursuant to a state grant of immunity) "would militate against, rather than for, the grant of certiorari here. For in such event a witness could not claim fear of federal prosecution as a basis for his refusal to testify." Respondents' logic here is so topsy-turvy that logical refutation thereof is a bit tiresome. The real point is that in the present status of the law, with *Feldman* on the books, petitioners do face federal incrimination *per* evidence which the Commission wants to extract from the within petitioners under

the state grant of "immunity". If *Feldman* were overruled *Knapp* itself would fall, and in the resulting altered status of the law the entire posture of the respective rights of the parties in the instant case would be so fundamentally transformed that, surely, the within judgments of contempt could not stand.

III. The issue of the reasonableness of petitioners' fear of federal incrimination.

Respondents' argument on this issue (Br. in Opp. pp. 12-13) consists of a reference to the Trial Court's attitude on the point (which had nothing to do with the question of whether as a matter of law waterfront thefts could give rise to federal prosecution, an observation that the Court below never reached the question, a couple of quotations from familiar decisions of this Court which are of a purely generalized doctrinal sort that does not conclude the instant issue, and an attempt to minimize or ridicule the idea that waterfront theft is an issuable item in this case.

To hear the Commission in its representations to this Court one would scarcely suspect that the very *raison d'etre* of the Waterfront Commission, as the Commission never tires of reminding everyone (except when, as now, official opportunism dictates otherwise), is the prevention of thefts and pilferages by racketeering waterfront elements. Suddenly, for the purposes of this appeal, the Waterfront Commission becomes altogether modest about this theft-prevention role.* This kind of argumentation, to use the Com-

* Contrast, for example, the sensationalistic feature story in the New York Times of Sunday November 26, 1961, p. 14S, entitled "'Flash' Pier Raids Aim At Pilferers"—a highly dramatized description of nocturnal heroics by the Commission's agents, including personal participation by its executive Director, Mr. Ambrose.

mission's phrase, "taxes credulity," in the face of the entire history of these contempt cases, where repeatedly and insistently the Commission has dinned into the ears of every judicial tribunal that has sat in these cases the ominous theme of waterfront thefts in connection with the exclusion of faithful watchmen like Markley.

It is therefore submitted that the Commission has wholly failed to negate the petitioners' reasonable fear of federal incrimination as to this prime federal prosecutive area relating to waterfront thefts.

IV. The issue of equal protection.

Respondents' only reply to the question tendered by our petition as to whether it is a violation of Fourteenth Amendment equal protection to deny to persons interrogated by the Waterfront Commission the benefit of the general New Jersey evidence statute which defines self-incrimination to include the federal incrimination, is that "Since this * * * involves a question of general statutory construction which will have uniform application, and is in no wise confined to petitioners, no question of the equal protection of the law is presented"—for which respondents cite no authority. We were not aware that there was any dearth of authority for the proposition that the equal protection clause was designed to prevent not only persons but *classes* from being singled out as a special subject of discriminatory legislation. E.g., *Pembina Consolidated Silver Min. & Mill. Co.* v. *Pennsylvania,* 125 U. S. 181; *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362; *Hernandez* v. *Texas,* 347 U. S. 475.

V. Other misstatements in respondents' brief in opposition.

On page 2 of their brief respondents state, "Since May 20, 1960, when the work stoppage ended, Markley has not set foot on the piers of American Export Lines in Hoboken. (App., p. 6a)" The record does not support this statement. Respondents' citation to "App., p. 6a" is to its motion papers dated November 1, 1961.

Another misstatement by respondents is their description of the ground of the decision below for reversal of the convictions of criminal contempt, respondents stating (Br. in Opp. p. 5) that this ground was "that the Superior Court should not have denied petitioners the opportunity to present evidence upon the question of their criminal contempt". The actual grounds of the aforesaid reversal were stated by the Court below as follows (Pet. 34a-35a):

> "However, we think that the judgments holding the defendants guilty of criminal contempt must be reversed. In *N. J. Dept. of Health* v. *Roselle*, 34 N. J. 331, 344 (1961), we expressed grave doubts whether a defendant's rights could be adequately protected in a 'double-barrelled proceeding,' where charges of both civil and criminal contempt are tried in a common hearing. Although the defendants did not specifically object to the dual aspects of the trial below, they did make known their desire to have an opportunity to introduce evidence on the question of intent to commit a criminal contempt. From our examination of the record, it appears that the defendants were exposed to criminal punishment without being afforded the opportunity to present evidence in their defense, if any, and in extenuation of the offenses charged and in mitigation of the penalties to be im-

posed. The trial court's refusal to hear any evidence, except for the limited purpose of pinpointing the areas of possible federal incrimination, denied the defendants the safeguards to which they were entitled as persons charged with criminal offenses. See *Cooke* v. *United States*, 267 U. S. 517, 537, 69 L. ed. 767, 774 (1924); *N. J. Dept. of Health* v. *Roselle*, *supra*, at 338-340."

We have called attention in this reply brief to respondents' imperfect handling of important items of fact because, frankly, we are in hopes that this Court will scrutinize respondents' presentation as one which is not deserving of any presumption of official fastidiousness.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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